

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE DEPARTMENT OF LABOR AND INDUSTRY

In the Matter of the Administrative Order
Issued to Elite Window and Remodeling
and John Wirtz, Individually; and

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION**

In the Matter of the Administrative Order
Issued to Kelly Exteriors, LLC, d/b/a
Affordable Design Builders and
Remodelers; and

In the Matter of the Administrative Order
Issued to Kelly Exteriors, d/b/a Affordable
Design Builders and Remodelers and
Roger Kelly individually.

The above-entitled matter came before Administrative Law Judge William J. Marshall for an evidentiary hearing on July 9, 2014 at the Office of Administrative Hearings. The record closed on that day at the conclusion of the hearing.

Christopher M. Kaisershot, Assistant Attorney General, appeared on behalf of the Minnesota Department of Labor and Industry (Department). There was no appearance by, or on behalf of, Elite Window and Remodeling and John Wirtz, Individually (Respondents).¹

STATEMENT OF THE ISSUES

1. Whether the Respondents were engaged in unlicensed residential building contractor or residential remodeler activities in violation of Minn. Stat. §§ 326B.082, subds. 1 and 7; 326B.805, subds. 1 and 3; and 326B.84(5) (2012)?

2. Whether the Respondents performed the work of an electrical contractor without first obtaining licensure from the Commissioner or the requisite \$25,000 bond and general liability insurance in violation of Minn. Stat. §§ 326B.082, subds. 1 and 7; and 326B.33, subds. 14, 15, 16, and 17 (2012)?

¹ Respondents Kelly Exteriors d/b/a Affordable Design Builders and Remodelers and Roger Kelly individually entered into a tentative settlement with the Department. The Department requested that the hearings be bifurcated and that the hearing against Kelly Exteriors d/b/a Affordable Building Design and Remodelers and Mr. Kelly individually be continued pending execution of the settlement agreement.

3. Whether the Respondents performed the work of a plumbing contractor without first obtaining licensure from the Commissioner or the requisite \$25,000 bond and general liability insurance in violation of Minn. Stat. §§ 326B.082, subds. 1 and 7, and 326B.46, subds. 1, 1b, and 2 (2012)?

4. Whether the Respondents engaged in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. §§ 326B.082, subds. 1 and 7; 326B.84(2) (2012); and Minn. R. 2891.0040 subp. 1C (2011)?

5. Whether the Respondents failed to reasonably supervise employees, agents, subcontractors, or salespersons, or have performed negligently or in breach of contracts, so as to cause injury or harm to the public?

6. Whether the Respondents obtained building permits by the use of Affordable Design's residential building contractor license?

7. Whether the Respondents demonstrated themselves to be untrustworthy, financially irresponsible, incompetent, or unqualified?

8. Whether the Respondents provided a response to the Department that was false, misleading or incomplete, or has failed to comply with the Department's March 7, 2013 request for information?

9. Whether the Respondents' request for hearing was filed solely for the purpose of delay or was frivolous under Minn. Stat. §326B.082?

10. Whether the Administrative Order with Penalty should be affirmed?

SUMMARY OF RECOMMENDATION

Based on the evidence in the hearing record, the Administrative Law Judge concludes that the Respondents failed to comply with the applicable legal requirements and recommends that the Administrative Order with Penalty be **AFFIRMED**.

Based upon the contents of the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. Respondent Wirtz is not now, and never has been, licensed by the Department as a residential building contractor or residential remodeler.²

2. Respondent Wirtz is not now, and never has been, licensed by the Department as an electrical contractor.³

² Testimony (Test.) of Chris Williams, Senior Investigator, Department of Labor and Industry.

³ *Id.*

3. Respondent Wirtz is not now, and never has been, licensed by the Department as a plumbing contractor.⁴

4. The Minnesota Department of Labor and Industry opened an investigation of the Respondent based upon a complaint received by a homeowner concerning the residential building contractor, remodeler, or roofer license status of the Respondent.⁵

5. The investigation included a review of the Respondent's Facebook page.⁶ The Respondent's Facebook page indicated that the Respondent performs remodeling and construction work on residential homes along with pictures of past projects and testimonials of satisfied customers.⁷ The pictures on the Facebook page show work that would require a license.⁸

6. The investigation also included an interview with the homeowner who filed the complaint. The homeowner indicated that she contracted with the Respondent to do some work on her home. The homeowner testified that the Respondent did not appear to know what he was doing, did less than acceptable work, did work outside of his abilities, and failed to finish portions of the agreed upon project.⁹

7. Senior Investigator Chris Williams was able to determine that Affordable Homes, owned and operated by Robert Kelly, had obtained a building permit for the Respondent so he could perform remodeling work on the home.¹⁰

8. Senior Investigator Williams interviewed Mr. Kelly who informed Investigator Williams that he routinely pulled permits for the Respondent, that they regularly worked together, and that he (Mr. Kelly) would receive a percentage of the Respondent's completed project income.¹¹

9. On March 7, 2013, the Department sent a letter to Respondent Wirtz notifying him that the Department had opened an investigation of his business based on information contained on the Respondent's Facebook page offering to perform work for which a residential building contractor, remodeler, or roofer license is required. The letter asked the Respondent to: 1) provide copies of all contracts, change orders, estimates, proposals, and agreements that he or his company had entered into with Minnesota consumers since January 1, 2008; 2) provide copies of all building permits, building permit applications and inspection reports for the properties identified in item one (1); 3) provide a complete list of all employees, independent contractors, subcontractors and suppliers that performed any work or made any contribution to the project at 15706 7th Avenue NW, Andover; 4) provide detailed accounting of the

⁴ *Id.*

⁵ *Id.*; Exhibit (Ex.) 108.

⁶ Ex. 108

⁷ *Id.*

⁸ Test. of C. Williams.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

payments you or your company made to Mr. Kelly or his company for obtaining building permits, on any job on your behalf; 5) provide detailed written explanation for your unlicensed plumbing, electrical and construction work; and 6) provide detailed accounting of all expenses incurred on the Andover project, and copies of the billing statements, invoices and receipts to support each expense.¹² The letter requested a written response by March 21, 2013, and advised the Respondent that a failure to respond within the time specified constitutes a violation of Minn. Stat. § 326B.082, subd. 2(b).¹³

10. Respondent Wirtz, through an attorney, did provide a written response to the Department's letter of March 7, 2013. On April 11, 2013, the Respondent's attorney faxed a letter dated March 21, 2013, indicating that the homeowner's complaints were inaccurate and the allegations unfounded.¹⁴ At no time did Mr. Wirtz or Mr. McGee provide the information requested in the March 7, 2013 letter.¹⁵

11. On April 11, 2013, the Department contacted the attorney to discuss the incomplete response and lack of licensure.¹⁶ The Respondent's attorney indicated he would talk to the Respondent and return the Department's call the following day.¹⁷ To date there has been no further response from Respondent Wirtz or his attorney to the request for information.¹⁸

Procedural History

12. On November 1, 2013, the Department issued an Administrative Order with Penalty (Order) to the Respondent based on the results of its investigation. The Order concludes that: 1) the Respondent violated Minnesota law when he acted or held himself out as a residential building contractor, residential remodeler, or residential roofer without having a license; 2) that the Respondent violated Minnesota law when he performed unlicensed electrical and plumbing work; 3) that the Respondents were engaged in fraudulent, deceptive, or dishonest practices by falsely representing themselves to be licensed in the procurement of a contract with the homeowner; 4) that the Respondent failed to reasonably supervise employees, agents, subcontractors, or salespersons, or performed negligently or in breach of contract, so as to cause injury or harm to the public; 5) that the Respondents obtained permits by the fraudulent use of Kelly Exteriors, LLC, d/b/a Affordable Design Builder and Remodelers' residential building contractor license; 6) that the Respondents demonstrated themselves to be untrustworthy, financially irresponsible or otherwise incompetent or unqualified to act under a license issued by the Commissioner; and 7) that the Respondents provided a

¹² Ex. 106.

¹³ *Id.*

¹⁴ Ex. 106.

¹⁵ Ex. 106 and Test. of C. Williams.

¹⁶ Ex. 109.

¹⁷ *Id.*

¹⁸ *Id.*

response to the Department that was false, misleading or incomplete, and have failed to comply with the Department's March 7, 2013 request for information.¹⁹

13. The Order imposed a penalty of \$11,000 and ordered the Respondents to "cease and desist" from violating the laws cited in the Order.²⁰ The penalty amount in the Order was calculated in accordance with the Department's penalty guidelines.²¹

14. On November 22, 2013, the Respondent sent a letter to the Department stating that he had received the Department's letter that day and stating that he disagreed with the conclusions of law, listed reasons why he disagreed with the conclusions of law, and wished to contest the Order and request a hearing.²²

15. On January 7, 2014, the Department issued its Notice and Order for Prehearing Conference (Notice and Order) in this matter setting a prehearing conference for March 3, 2014, at 2:30 p.m., at the Office of Administrative Hearings. The Notice and Order provides, in part, that:

Respondent's failure to appear at the prehearing conference, settlement conference, or *hearing* may result in a finding that the Respondent is in default, that the allegations contained in this Notice and Order for Prehearing Conference and Hearing may be accepted as true, and its proposed action may be upheld.²³

16. The Notice and Order was served on Elite Window & Remodeling, Inc. and John Wirtz on January 7, 2014.²⁴

17. In accordance with the Notice and Order, a prehearing hearing conference was held on March 3, 2014. John Wirtz attended the prehearing conference for the Respondent. Christopher Kaisershot, Assistant Attorney General, attended the prehearing conference for the Department.

18. At the prehearing conference, the parties agreed to hold the evidentiary hearing on July 9, 2014 with a second day on July 10, 2014 if needed, at the Office of Administrative Hearings. The parties also agreed to start the hearing at 9:30 a.m.²⁵

19. A prehearing order was served on the parties, which specified that the evidentiary hearing would take place on July 9 and 10, 2014, beginning at 9:30 a.m., at the Office of Administrative Hearings.²⁶

¹⁹ Ex. 109.

²⁰ *Id.*

²¹ Test. of C. Williams.

²² Ex. 110.

²³ Attachment A at 6 (emphasis added).

²⁴ See Attachment A at Affidavit of Service.

²⁵ Recording of March 3, 2014 Prehearing Conference.

²⁶ First Prehearing Order (March 4, 2014).

20. An evidentiary hearing was held as scheduled on July 9, 2014. The Respondent was given sufficient time to appear, but there was no appearance by the Respondent. The Respondent did not contact the Administrative Law Judge or the Office of Administrative Hearings prior to the hearing to request a continuance or to state that he was unavailable.

21. At the hearing, counsel for the Department requested that the Administrative Law Judge allow the Department's witnesses to testify, even though the Respondent failed to appear, in order to make a record of the facts in the case. The Department's witnesses were allowed to testify.

22. Counsel for the Department also requested that the Administrative Law Judge make a finding that the Respondent requested the hearing solely for purposes of delay or that the hearing request was frivolous. The Administrative Law Judge took the request under advisement.

23. Because Respondent failed to appear at the hearing or to contact the Administrative Law Judge prior to the hearing, the Respondent is in default.

24. Pursuant to Minn. R. 1400.6000, the allegations contained in the Notice and Order for Hearing, a copy of which is attached as Attachment A, are taken as true, deemed proven without further evidence, and incorporated by reference into these Findings of Fact.

Based on these Findings of Fact, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

CONCLUSIONS OF LAW

1. The Administrative Law Judge and the Commissioner of Labor and Industry are authorized to consider the charges against the Respondent under Minn. Stat. §§ 14.50, 326B.082, 326B.84, 326B.33, 326B.46, and Minn. R. 2891.0040.

2. The Department has complied with all applicable procedural requirements of law and rule.

3. The Respondent received timely and proper notice of the July 9, 2014 hearing in this matter.

4. Minn. Stat. § 326B.802, subd. 11, defines "Residential building contractor" as:

[a] person in the business of building residential real estate, or of contracting or offering to contract with an owner to build residential real estate, by providing two or more special skills as defined in this section. A residential building contractor may also contract or offer to contract with an owner to improve existing residential real estate.

5. Minn. Stat. § 326B.802, subd. 12, defines “Residential remodeler” as: “a person in the business of contracting or offering to contract with an owner to improve existing residential real estate by providing two or more special skills as defined in this section.”

6. Minn. Stat. § 326B.33B, subd. 14 states:

Except as otherwise provided by law, no individual other than an employee, partner, or officer of a licensed contractor, as defined by section 326B.31, subdivision 14, shall perform or offer to perform electrical work with or without compensation unless the individual obtains a contractor's license. A contractor's license does not of itself qualify its holder to perform or supervise the electrical work authorized by holding any class of personal license.

7. Minn. Stat. § 326B.33, subd. 15 states:

As a condition of licensing, each contractor shall give and maintain bond to the state in the sum of \$25,000 conditioned upon the faithful and lawful performance of all work contracted for or performed by the contractor within the state of Minnesota and such bond shall be for the benefit of persons injured or suffering financial loss by reason of failure of such performance. The bond shall be filed with the commissioner and shall be in lieu of all other license bonds to any other political subdivision. Such bond shall be written by a corporate surety licensed to do business in the state of Minnesota.

8. Minn. Stat. § 326B.33, subd. 16, states:

Each contractor shall have and maintain in effect general liability insurance, which includes premises and operations insurance and products and completed operations insurance, with limits of at least \$100,000 per occurrence, \$300,000 aggregate limit for bodily injury, and property damage insurance with limits of at least \$50,000 or a policy with a single limit for bodily injury and property damage of \$300,000 per occurrence and \$300,000 aggregate limits. Such insurance shall be written by an insurer licensed to do business in the state of Minnesota and each contractor shall maintain on file with the commissioner a certificate evidencing such insurance. In the event of a policy cancellation, the insurer shall send written notice to the commissioner at the same time that a cancellation request is received from or a notice is sent to the insured.

9. Minn. Stat. § 326B.33, subd. 17(a), states:

Each contractor must designate a responsible master electrician, satellite system installer, or power limited technician, who shall be responsible for the performance of all electrical work in accordance with the requirements of sections 326B.31 to 326B.399, all rules adopted under these sections, and all

orders issued under section 326B.082. The classes of work that a licensed contractor is authorized to perform shall be limited to the classes of work that the responsible master electrician, satellite system installer, or power limited electrician is licensed to perform.

10. Minn. Stat. § 326B.46, subd. 1 states:

(a) No individual shall engage in or work at the business of a master plumber, restricted master plumber, journeyman plumber, and restricted journeyman plumber unless licensed to do so by the commissioner. A license is not required for individuals performing building sewer or water service installation who have completed pipe laying training as prescribed by the commissioner. A master plumber may also work as a journeyman plumber, a restricted journeyman plumber, and a restricted master plumber. A journeyman plumber may also work as a restricted journeyman plumber. Anyone not so licensed may do plumbing work which complies with the provisions of the minimum standards prescribed by the Plumbing Board on premises or that part of premises owned and actually occupied by the worker as a residence, unless otherwise forbidden to do so by a local ordinance.

(b) No person shall engage in the business of planning, superintending, or installing plumbing or shall install plumbing in connection with the dealing in and selling of plumbing material and supplies unless at all times a licensed master plumber, or in cities and towns with a population of fewer than 5,000 according to the last federal census, a restricted master plumber, who shall be responsible for proper installation, is in charge of the plumbing work of the person.

(c) Except as provided in subdivision 1a, no person shall perform or offer to perform plumbing work with or without compensation unless the person obtains a contractor's license. A contractor's license does not of itself qualify its holder to perform the plumbing work authorized by holding a master, journeyman, restricted master, or restricted journeyman license.

11. Minn. Stat. § 326B.46, subd. 1b states:

(a) Each contractor must designate a responsible licensed plumber, who shall be responsible for the performance of all plumbing work in accordance with sections 326B.41 to 326B.49, all rules adopted under these sections and sections 326B.50 to 326B.59, and all orders issued under section 326B.082. A plumbing contractor's responsible individual must be a master plumber. A restricted plumbing contractor's responsible individual must be a master plumber or a restricted master plumber. A plumbing contractor license authorizes the contractor to offer to perform and, through licensed and registered individuals, to perform plumbing work in all areas of the state. A restricted plumbing contractor license

authorizes the contractor to offer to perform and, through licensed and registered individuals, to perform plumbing work in all areas of the state except in cities and towns with a population of more than 5,000 according to the last federal census.

(b) If the contractor is an individual or sole proprietorship, the responsible licensed individual must be the individual, proprietor, or managing employee. If the contractor is a partnership, the responsible licensed individual must be a general partner or managing employee. If the contractor is a limited liability company, the responsible licensed individual must be a chief manager or managing employee. If the contractor is a corporation, the responsible licensed individual must be an officer or managing employee. If the responsible licensed individual is a managing employee, the responsible licensed individual must be actively engaged in performing plumbing work on behalf of the contractor, and cannot be employed in any capacity as a plumber for any other contractor. An individual may be the responsible licensed individual for only one contractor.

(c) All applications and renewals for contractor licenses shall include a verified statement that the applicant or licensee has complied with this subdivision.

12. Minn. Stat. § 326B.46, subd. 2 states:

(a) The bond and insurance requirements of paragraphs (b) and (c) apply to each person who performs or offers to perform plumbing work within the state, including any person who offers to perform or performs sewer or water service installation without a contractor's license. If the person performs or offers to perform any plumbing work other than sewer or water service installation, then the person must meet the requirements of paragraphs (b) and (c) as a condition of holding a contractor's license.

(b) Each person who performs or offers to perform plumbing work within the state shall give and maintain bond to the state in the amount of at least \$25,000 for (1) all plumbing work entered into within the state or (2) all plumbing work and subsurface sewage treatment work entered into within the state. If the bond is for both plumbing work and subsurface sewage treatment work, the bond must comply with the requirements of this section and section 115.56, subdivision 2, paragraph (e). The bond shall be for the benefit of persons injured or suffering financial loss by reason of failure to comply with the requirements of the State Plumbing Code and, if the bond is for both plumbing work and subsurface sewage treatment work, financial loss by reason of failure to comply with the requirements of sections 115.55 and 115.56. The bond shall be filed with the commissioner and shall be written by a corporate surety licensed to do business in the state.

(c) Each person who performs or offers to perform plumbing work within the state shall have and maintain in effect public liability insurance, including products liability insurance with limits of at least \$50,000 per person and \$100,000 per occurrence and property damage insurance with limits of at least \$10,000. The insurance shall be written by an insurer licensed to do business in the state of Minnesota. Each person who performs or offers to perform plumbing work within the state shall maintain on file with the commissioner a certificate evidencing the insurance. In the event of a policy cancellation, the insurer shall send written notice to the commissioner at the same time that a cancellation request is received from or a notice is sent to the insured.

13. Minn. Stat. § 326B.805, subd. 1 provides, in relevant part, that:

A person who meets the definition of a residential building contractor as defined in section 326B.802, subdivision 11, must be licensed as a residential building contractor by the commissioner. A person who meets the definition of a residential remodeler as defined in section 326B.802, subdivision 12, must be licensed by the commissioner as a residential remodeler or residential building contractor. A person who meets the definition of a residential roofer as defined in section 326B.802, subdivision 14, must be licensed by the commissioner as a residential roofer, residential building contractor, or residential remodeler.

14. Minn. Stat. § 326B.805, subd. 3, provides, in relevant part, that: no person “required to be licensed by subdivision 1 may act or hold themselves out as a residential building contractor, residential remodeler, [or] residential roofer, ... for compensation without a license issued by the commissioner.”

15. The Respondent Wirtz violated Minn. Stat. § 326B.805, subds. 1 and 3, when he acted or held himself out as a residential building contractor, residential remodeler, or residential roofer without having a license issued by the Department.

16. The Respondent Wirtz violated Minn. Stat. § 326B.33, subds. 14, 15, 16, and 17 when he performed the work of an electrical contractor without first obtaining licensure from the Commissioner or the requisite \$25,000 bond and general liability insurance.

17. The Respondent Wirtz violated Minn. Stat. § 326B.46, subds. 1, 1b, and 2 when he performed the work of a plumbing contractor without first obtaining licensure from the Commissioner or the requisite \$25,000 bond and general liability insurance.

18. The Respondent Wirtz engaged in fraudulent, deceptive, and dishonest practices in violation of Minn. Stat. 326B.84(2), and Minn. R. 2891.0040 subp. 1C (2011).

19. The Respondent Wirtz failed to reasonably supervise employees, agents, subcontractors, or salespersons, or have performed negligently or in breach of contracts, so as to cause injury or harm to the public.

20. The Respondent did obtain building permits by the use of Affordable Design's residential building contractor license.

21. The Respondent demonstrated themselves to be untrustworthy, financially irresponsible, incompetent, or unqualified.

22. The Respondent provided a response to the Department that was false, misleading or incomplete, or has failed to comply with the Department's March 7, 2013 request for information.

23. Minn. Stat. § 326B.082, subd. 1, provides in relevant part:

The commissioner may enforce all applicable law under this section. The commissioner may use any enforcement provision in this section, including the assessment of monetary penalties, against a person required to have a license, registration, certificate, or permit under the applicable law based on conduct that would provide grounds for action against a licensee, registrant, certificate holder, or permit holder under the applicable law.

24. Minn. Stat. § 326B.082, subd. 7, provides that the Commissioner may issue an administrative order to any person who the Commissioner determines has committed a violation of the applicable law.

25. An order by the Department taking disciplinary action against the Respondent's license is in the public interest.

26. It is appropriate to affirm the Administrative Order with Penalty issued November 1, 2013, to Respondent.

27. The Respondent's request for a hearing was not frivolous. The Respondent made reasonable responses to the Administrative Order with Penalty in his letter dated November 22, 2013 and planned to present evidence to support his position at hearing. His absence for the hearing does not establish a frivolous request.

Based upon these Conclusions of Law, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge recommends that the Administrative Order with Penalty issued on November 1, 2013 be **AFFIRMED**, however, the Commissioner should not consider adding the costs charged to the Department by the Office of Administrative Hearings for the hearing to the amount of the penalty.

Dated: July 25, 2014

s/William J. Marshall

WILLIAM J. MARSHALL
Administrative Law Judge

Reported: Digitally Recorded
No transcript prepared

NOTICE

Pursuant to Minn. Stat. § 326B.082, subd. 8(c), this report is a recommendation, not a final decision. The Commissioner will make a final decision after a review of the record and may adopt, reject, or modify these Findings of Fact, Conclusions, and Recommendation. The Commissioner shall not issue a final order until at least five days after the date of this report. Any person aggrieved by this report may, within those five days, serve written comments on the report. Parties should contact Commissioner Ken Peterson, Attention: Wendy Willson Legge, Director of Legal Services, Minnesota Department of Labor & Industry, 443 Lafayette Road, St. Paul, MN 55155; telephone number: 651-284-5126, to ascertain the procedure for filing exceptions or presenting argument to the Commissioner.

If the Commissioner fails to issue a final decision within 90 days of the close of the record, this Report will constitute the final agency decision under Minn. Stat. § 14.62, subd. 2a. The record closes upon the filing of exceptions to the Report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law. If the Commissioner fails to issue a final decision within 90 days of the close of the record under Minn. Stat. § 14.61, this Report becomes a final decision.

MEMORANDUM

The Department requested that the Administrative Law Judge make a finding that the hearing requested by the Respondent was solely for purposes of delay or that the hearing request was frivolous. The Department seeks such a finding to allow the Commissioner to add the costs charged to the Department by the Office of Administrative Hearings for the hearing to the amount of the penalty.²⁷

A frivolous claim is one that is without any reasonable basis in law or equity and could not be supported by a good faith argument for a modification or reversal of existing law.²⁸ Minnesota Rules of General Practice 9.06(b)(3) defines “frivolous litigant” to include:

A person who institutes and maintains a claim that is not well grounded in fact and not warranted by existing law ... or that is interposed for any improper purpose, such as to harass or cause unnecessary delay or needless increase in the cost of litigating the claim.

In this case, the Respondent had responses to the allegations and planned on presenting evidence to support his position. It is unfortunate that the Respondent decided not to appear for the hearing. However, this alone does not make his hearing request frivolous. The Department has not presented adequate evidence to establish that the Respondent’s hearing request is frivolous.

For these reasons, the Administrative Law Judge concludes that the Administrative Order with Penalty was properly issued and the Respondent’s request for a hearing was not frivolous.

W. J. M.

²⁷ *Id.* at 5 (citing Minn. Stat. § 326B.082, subd. 8(d)).

²⁸ *Maddox v. Department of Human Services*, 400 N.W.2d 136, 139 (Minn. Ct. App. 1987).